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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936

No. 372

CARL W. McNEIL, DOING BUSINESS AS McNEIL'S LIQUOR STORE,
(Defendant) Appellant,

vs.

JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellant.

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JOSEPH TRINER CORPORATION, A CORPORATION,
(Plaintiff) Appellee.

Brief of Appellant.

I.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the Supreme Court of Illinois in this case is officially reported in Volume 363, Illinois Reports, Pages 559-582 and is printed at pages 14 to 34 in the Statement As To Jurisdiction and at pages 38 to 57 of the Record.

II.

STATEMENT OF THE CASE.

The Appellee filed its complaint under Section 2 of the Illinois Fair Trade Act (Smith-Hurd Illinois Revised Statutes, 1935, chapter 121½, sec. 188, *et seq.*; Illinois State Bar Revised Statutes, 1935, chapter 140, sec. 8, *et seq.*), for an injunction against the appellant to restrain him from wilfully advertising for sale, offering to sell or selling, at retail, in the city of Chicago, a certain brand of whiskey, said brand bearing the trade-mark, and trade name of "Old Quaker", at prices below a uniform retail price established in that city for said brand in various contracts entered into by retailers of the brand, other than the appellant, with their respective vendors, pursuant to the statute (R. 1-21). The statute is set out *in haec verba* on pages 4-6, *infra*. Upon the application of the appellee, an order was entered directing the issuance of a temporary injunction (R. 21). Thereafter the appellant filed his written motion to dissolve the temporary injunction and to dismiss the complaint for want of equity on the ground that it was substantially insufficient in law (R. 22-25). The sole point raised in the motion to dismiss was that the Fair Trade Act violated the State and Federal Constitutions.

The complaint alleges in substance: The appellee is a corporation engaged in business in the City of Chicago, Illinois, as a wholesale distributor selling to retailers for resale in that city various brands of liquors and alcoholic beverages of standard quality. The appellant is a retailer, engaged in said city in selling various brands of liquor and alcoholic beverages at retail (R. 1). The appellee sells at wholesale to retailers of said city certain liquors and

alcoholic beverages commonly known as "Schenley Products" which it purchases from a New York corporation, Schenley Distributors, Inc., which is licensed to do business in the State of Illinois, and is the sole sales and distributing agent of certain affiliated liquor distilleries known as the Schenley Distilleries. The appellee is one of ten wholesalers of Schenley products in the city of Chicago who are known as "local Schenley distributors." These local Schenley distributors are limited to that number and are the only ones selling Schenley Products at wholesale in the city of Chicago (R. 2).

The appellee has a considerable financial investment in its business. An important and valuable asset of said business is the good will of the retailers who purchase Schenley products from the appellee, and of the public and consumers who purchase said products in Chicago. The good will has been built up in part by the maintenance by local Schenley distributors and Schenley Distributors, Inc., of a uniform retail price for their products (R. 3). Schenley products consist of various brands of straight whiskeys, blended whiskeys, bonded whiskeys, gins, brandies, cordials, and rums. All of said brands at all times have been and are of standard quality or make. All of said brands are sold in bottles which have affixed thereon a paper label bearing the trade mark, duly registered with the United States Patent Office, of the producer of the product and the brand and name of the producer. One of said brands is known as "Old Quaker". Said brand of "Old Quaker" is in fair and open competition with commodities of the same general class sold at retail in said city, produced by persons other than said Schenley Distilleries (R. 4).

The complaint alleges in some detatil the peculiar characteristics of the market in liquor and alcoholic beverages and sets forth the beneficial effects of the maintenance of

uniform prices of liquors and the evil effects of price cutting (R. 4-7). In view of the position taken by the appellant that the statute under which this action is brought is invalid, we consider it purposeless to go more fully into this portion of the complaint.

Schenley Distributors, Inc., adheres to a business policy of securing to consumers a uniform and standard retail price fixed at an amount fair and reasonable to manufacturer, distributor and consumer for each brand of Schenley products sold in Chicago. The uniform and standard retail price for the brand known as "Old Quaker" is $1.89 per quart, 98c per pint and 50c per one-half pint. Schenley Distributors, Inc., in accordance with said business policy, suggests to the appellee and other local Schenley distributors a minimum retail price for which each of its brands should be sold at retail (R. 8). In the event that any distributor sells any brand of Schenley products to any retailer who is known by said distributor to sell any brand of Schenley products in Chicago at less than the uniform retail price suggested, Schenley Distributors, Inc. refuses to sell said products to said distributor (R. 9).

The complaint alleges the passage of the Fair Trade Act (R. 7-8) which is in words and figures as follows:

> "An Act to Protect Trade Mark Owners, Distributors and the Public Against Injurious and Uneconomic Practices in the Distribution of Articles of Standard Quality Under a Trade Mark, Brand or Name.
>
> Be it Enacted by the People of the State of Illinois Represented in the General Assembly:
>
> Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which

is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. This Act may be known and cited as the 'Fair Trade Act.' "

After the enactment of the Fair Trade Act, the appellee to avail itself of the benefits of the Act, entered into contracts with the retailers, to whom it sells, which contracts contain a provision that said retailers would not resell said brands at retail in the City of Chicago except at the prevailing uniform and standard Schenley retail price. During the three months preceding the institution of suit, all sales of Schenley Products made by appellee to retailers were made under such contracts. Appellant knew of these contracts at the time that he engaged in the conduct hereinafter described. The other local Schenley distributors similarly entered into like contracts with their retailers, and the number of all retailers in Chicago selling under such contracts approximated 85% of all retailers selling Schenley products in that city (R. 9-10). As a result of the foregoing business policy certain beneficial consequences are alleged to have ensued (R. 10-11). We do not consider it material to describe these at length.

During the month of October, 1935, the appellant, Carl W. McNeil threatened to sell, offer for sale and advertise for sale, the brand of whiskey known as "Old Quaker" at a price lower than the stipulated uniform standard Schenley retail price. At the time of making such threats the appellant knew of the existing contracts to maintain the price of said brand. On October 16, 1935, the appellee informed the appellant of the business policy of the appellee and of its attempts to avail itself of the benefits of the Fair Trade Act by entering into said agreements, and requested the appellant not to sell, offer for sale or

advertise for sale at retail in Chicago said brand of "Old Quaker" below the uniform price. The appellee tendered to the appellant a form of printed agreement which it used in making sales of Schenley products to other retailers (R. 11-12). Said form of printed agreement is attached to the complaint as an exhibit (R. 18-20). The appellant refused to enter into such an agreement (R. 12).

On October 18, 1935, the appellant sold large quantities of the brand of "Old Quaker" at 77c per pint (the uniform price whereof was then 98c per pint) said appellant knowing at the time of the various contracts stipulating the uniform retail price. Thereafter the appellant was requested by appellee to cease underselling the uniform price, but the appellant asserted that he would not refrain from so doing (R. 13). As a result of the appellant's conduct a great number of other retailers located in the vicinity of the appellant's store threatened to violate their contracts with the appellee and to sell and offer for sale said brand of "Old Quaker" at the price of 77c or less per pint in order to meet competition. Several of the retailers did violate their contracts. The sales by said retailers at said price of 77c and below, it is alleged, did not yield said retailers a fair and reasonable profit and some of the retailers began to and did offer to the public substitute brands for "Old Quaker" when the public called for that brand. The appellee consequently suffered great loss and irreparable injury (R. 13-14).

On November 8, 1935, the appellant again offered to sell, advertised for sale and sold "Old Quaker" at 77c per pint. On that day the appellant displayed in the front window of his store bottles bearing the trade name and trade mark of "Old Quaker" and attached to the pane of said window, signs advertising said brand at 77c per pint. The uniform price was then 98c per pint, and appellant knew that (R. 14).

All of the quantity of "Old Quaker" sold by appellant was purchased by the appellant from various persons within the State of Illinois who kept and had said quantity in stock in said State prior to selling same to said appellant. Said quantity was not purchased from the appellee nor was it purchased under any of said Fair Trade agreements. Said quantity was purchased subsequent to the time when said Fair Trade agreements were entered into by the appellee and subsequent to the time that said appellant knew of the standard and uniform price for said brand fixed in said agreements. Said whiskey was not dealt in by appellant for the purpose of or in the course of closing out said quantity of said brand for the purpose of discontinuing delivery of said brand nor because said quantity nor any part thereof was damaged or deteriorated nor on account of or pursuant to an order of court (R. 14-15).

The complaint alleges that unless the appellant is restrained from selling below the uniform price great and irreparable injury to the plaintiff will result. The injury is specifically set forth. The amount of compensation which would afford relief to the appellee is alleged to be difficult of ascertainment. An injunction against the appellant is accordingly prayed (R. 15-17).

The motion of the appellant for a decree dismissing the complaint for want of equity on the ground that the complaint is substantially insufficient in law raises the sole objection that the Fair Trade Act is unconstitutional (R. 22-25). The specific objections are: A. The Act violates Article I, Section 8, of the Federal Constitution in that it attempts to regulate the sale of commodities in commerce among the several states. B. It violates Article I, Section 10, of the Federal Constitution in that it impairs the obligation of contracts (R. 22). C. It violates the due process clause of the Fourteenth Amendment to the Fed-

eral Constitution in that its provisions, terms and language are so incomplete, vague, indefinite and uncertain that the Act does not express clearly or intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and provides for arbitrary classification of persons. D. It violates the Fourteenth Amendment to the Federal Constitution by denying to the defendant the equal protection of the laws (R. 23). E. It violates Article II, Section 2, of the Illinois Constitution by depriving the defendant of his property without due process of law. F. It violates Article II, Section 14, of the Illinois Constitution because it impairs the obligation of contracts. G. It violates Article IV, Section 1, of the Illinois Constitution in that it delegates legislative powers to private persons. H. It violates Article IV, Section 22, of the Illinois Constitution in that it grants special and exclusive privileges and immunities to certain persons while denying them to the defendant and persons similarly situated (R. 24-25).

The trial court held the statute constitutional and overruled the motion to dismiss the complaint. The appellant elected to abide by his motion and accordingly a final decree was entered granting a permanent injunction as prayed for in the complaint (R. 26-27). On an appeal taken directly to the Supreme Court of Illinois, the Supreme Court also held the statute constitutional and affirmed the decree (R. 38-58). The sole question presented to this Court is the constitutionality of the Fair Trade Act in the light of the Fourteenth Amendment to the Federal Constitution.

SPECIFICATION OF ERRORS.

(1) The Supreme Court of Illinois erred in holding that said Fair Trade Act is a valid exercise of the police power.

(2) The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it deprives the appellant of property without due process of law in that (a) its provisions, terms and language are so incomplete, vague, indefinite and uncertain, particularly in the use of the words "articles of standard quality", "commodities of the same general class", "in fair and open competition" and "any commodity", that said act does not express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder; (b) it deprives the appellant and persons similarly situated of vested rights in articles and commodities owned by them; (c) it delegates to persons not constituting the General Assembly of the State of Illinois the legislative power to determine the price at which commodities should be sold.

(3) The Supreme Court of Illinois erred in not holding that said Fair Trade Act is repugnant to the Fourteenth Amendment to the Constitution of the United States for the reason that it denies to appellant the equal protection of the laws in that it provides for arbitrary classifications of persons and commodities.

(4) The Supreme Court of Illinois erred in affirming the decree of the Circuit Court of Cook County, Illinois.

(5) The Supreme Court of Illinois erred in refusing to reverse the decree of said Circuit Court of Cook County, Illinois.

SUMMARY OF ARGUMENT.

I.

The Fair Trade Act deprives the appellant of his property without due process in that it vests in private individuals the arbitrary power to fix the price at which he may sell his property.

II.

The Fair Trade Act provides for arbitrary classifications of commodities which have no relation to the object sought to be accomplished and thereby violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

III.

Section 2 of the Fair Trade Act delegates to persons not constituting the General Assembly, legislative powers and thus violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

1. Section 2 of the Fair Trade Act, in violation of the Constitution, delegates to any individuals who choose to avail themselves of that delegation, the power to regulate the prices of commodities sold by others.

2. The Fair Trade Act in delegating legislative power to private persons violates the due process clause of the Fourteenth Amendment.

IV.

The Fair Trade Act is couched in language so incomplete, vague, indefinite and uncertain that it fails to express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and thereby violates the due process clause of the Federal Constitution.

1. The title must be regarded as a part of the Act and considered in its interpretation.

2. Statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application, violate the constitutional requirement of due process.

3. The phrase "articles of standard quality" in the title of the Fair Trade Act is vague, indefinite and uncertain.

4. The phrase "in fair and open competition" in Section 1 of the Fair Trade Act is incomplete, vague, indefinite and uncertain.

5. The term "any commodity" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

6. The phrase "any contract entered into pursuant to the provisions of Section 1" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

V.

An analysis of the opinion of the Supreme Court of Illinois in this case and of opinions of courts in other jurisdictions passing upon the validity of almost identical Fair Trade Acts, demonstrates that the sounder view considers the statute unconstitutional.

ARGUMENT.

I.

The Fair Trade Act deprives the appellant of his property without due process in that it vests in private individuals the arbitrary power to fix the price at which he may sell his property.

It is settled law that an unconstitutional deprivation of property does not necessarily mean a physical taking away of tangible property. The right to buy, sell, barter and exchange property is a necessary incident of ownership and the deprivation of this right is subject to the same constitutional limitations as is the taking of the property itself. More specifically, it has been judicially determined that the right of an owner to fix the price at which he may sell his property is protected by the due process clause.

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373; 55 L. Ed. 502, 31 S. Ct. 376;

People v. *Steele*, 231 Ill. 340, 83 N. E. 236;

Tyson v. *Banton*, 273 U. S. 418, 429, 71 L. Ed. 722.

The law is equally well settled that the rights of contract guaranteed by the Federal Constitution include the right to acquire and alienate property subject only to such conditions as the owner thereof may voluntarily assume.

Morehead v. *Tipaldo*, ... U. S. ....., 80 L. Ed. 921, 56 S. Ct. 918;

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163;

Meyer v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446;
Adkins v. *Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394, 24 A. L. R. 1238;
Adair v. *United States*, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277;
Allgeyer v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427.

The appellant contends that the Illinois Fair Trade Act is in direct derogation of these unquestioned principles of law. The effect of the injunction issued by the trial court denies appellant the right to determine the price at which he can sell his own property. He has been forced by judicial command to accept the minimum resale price fixed by appellee in its contracts, not with appellant, but with other persons. His submission to appellee's price-fixing agreements with other persons is exacted, notwithstanding the fact that appellant did not acquire his property from appellee and that there is no privity of contract whatever between them. The tenuous ground upon which the Fair Trade Act permits the imposition of price-fixing arrangements entered into by private individuals upon third persons strangers to and unwilling to participate therein, is mere knowledge of such price-fixing arrangements. The Act is not limited in its application to persons learning of the price-fixing arrangements subsequent to the acquisition of property, but it is equally applicable to persons who acquire property in ignorance that there are price-fixing contracts in existence with reference thereto. Thus, the effect of the Act is to expose a purchaser of property to the hazard of an undisclosed and unascertainable restriction as to the price at which he can make a resale thereof. Further, the Act is not limited to the enforcement of price-fixing arrangements in existence at the time of the acquisi-

tion of the property: the Act is applicable with equal force if the price-fixing arrangements are made subsequent to the time that a third person may acquire property. All that is necessary is that knowledge be obtained prior to the time of resale. If this condition is met, a third person is at the absolute mercy of the price-fixers and he is required to surrender with reference to his own property, the right to determine a minimum resale price.

Not only does the Fair Trade Act permit the appellee to dictate to appellant the minimum price at which he may sell his property, but the power conferred upon the appellee and persons similarly situated is subject to no restraints, qualifications or limitations whatever. Having qualified as a person damaged by the Act because of the selling by a competitor at a price below the minimum price established by any contract, the price-fixers, although not the manufacturers of the commodity involved, nor the owners of the trademark which it bears, are granted unbridled discretion in enforcing their price dictates upon their competitors. The legislature has not subjected the price-fixers to any standards or controls of any kind in exercising their price-fixing function; the price-fixers are permitted to exercise their uncontrolled discretion in specifying minimum prices without any regard to the intrinsic worth of the commodity, its cost of production, or any consideration of what would constitute a fair and just return to the dealer thereof. The price specified may be motivated by caprice, malice or ignorance; it need not be uniform as to all persons similarly situated, or to any minimum number of them. The price-fixers are free to give notice of a minimum resale price to such dealers as they wish to subject to their price-fixing arrangements and to leave others free to sell the same merchandise at whatever price they see fit. Under the Act it is permissible for the price-fixers to enter into two or more contracts fixing different prices on iden-

tical merchandise and thereby creating a price differential among dealers in the same class. Moreover, once having fixed a price by contract and having notified retailers thereof, the price-fixers are free to enter into a subsequent contract fixing a lower price than the one stipulated by the first contract. In such event there is no requirement that the price-fixers give general notice of the change in price. This produces the manifestly unjust situation where a dealer selling his merchandise for the price specified in the first contract and which is no longer effective, is obliged to compete with others who enjoy the advantage of underselling him with impunity by knowledge of the second contract.

It is hard, we submit, to conceive of legislation which is more arbitrary in the purest and most realistic sense of the term. The vesting of such arbitrary power in private individuals is clearly repugnant to the due process clause of the Federal Constitution.

Yick Wo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064;

Schechter Poultry Corporation v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947;

Carter v. *Carter Coal Company and Others,* 298 U. S. 238, 80 L. Ed. 749, 56 Sup. Ct. Rep. 855;

Washington v. *Roberge,* 278 U. S. 116, 73 L. Ed. 210, 49 Sup. Ct. Rep. 50;

Eubank v. *Richmond,* 226 U. S. 137, 57 L. Ed. 156, 33 Sup. Ct. Rep. 76.

II.

The Fair Trade Act provides for arbitrary classifications of commodities which have no relation to the object sought to be accomplished and thereby violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

The Fair Trade Act is vulnerable to attack on the ground that the classifications of commodities therein established are entirely inadequate to accomplish the purposes of the statute. The requirement that the specified commodities be in fair and open competition with other commodities is explainable only by the motive to insure that competition be unhampered and that monopoly be discouraged. The Act concededly purports to legalize only vertical and not horizontal price fixing and still condemns the creation of a monopoly. But the safeguard provided is futile. The requirement is that the commodities be in fair and open competition with commodities of "the same general class" produced by others.

In order to ascertain the meaning of "the same general class" we are compelled to consider the Trade Mark Statute of Illinois which is in *pari materia.* (See *People* v. *Wallace,* 291 Ill. 465, 470, 126 N. E. 175.) The Trade Mark Act (Illinois State Bar Revised Statutes, 1935, Chap. 140; Smith-Hurd Revised Statutes, 1935, Chap. 140) was amended at the same session of the General Assembly at which the Fair Trade Act was passed and sets up general classes of commodities not theretofore contained in the Trade Mark Act. Hence it is necessary to consider the two acts in conjunction with each other. (*People* v. *Wallace,* 291 Ill. 465, 470, 126 N. E. 175.)

Section 3 of the Trade Mark Act (as amended in 1935) establishes forty-nine specifically enumerated classes of

merchandise for the purpose of the statute and it must be assumed that in using the phrase "same general class" in another act passed at the same session concerning trade marks, the legislature referred to these forty-nine classes. Unless that assumption be conceded we are left without any guide in determining what constitutes the "same general class".

The forty-nine classes are as follows:

"(1) Raw or partly prepared materials.
(2) Receptacles.
(3) Baggage, animal equipments, port-folios and pocket-books.
(4) Abrasive, detergent, and polishing materials.
(5) Adhesives.
(6) Chemicals, medicines, and pharmaceutical preparations.
(7) Cordage.
(8) Smokers' articles, not including tobacco products.
(9) Explosives, firearms, equipment, and projectiles.
(10) Fertilizers.
(11) Inks and inking materials.
(12) Construction materials.
(13) Hardware and plumbing and steam-fitting supplies.
(14) Metals and metal castings and forgings.
(15) Oils and greases.
(16) Paints and painters' materials.
(17) Tobacco products.
(18) Vehicles, not including engines.
(19) Linoleum and oiled cloth.
(20) Electrical apparatus, machines, and supplies.
(21) Games, toys, and sporting goods.

(22) Cutlery, machinery, and tools, and parts thereof.
(23) Laundry appliances and machines.
(24) Locks and safes.
(25) Measuring and scientific appliances.
(26) Horological instruments.
(27) Jewelry and precious metal ware.
(28) Brooms, brushes and dusters.
(29) Crockery, earthenware, and porcelain.
(30) Filters and refrigerators.
(31) Furniture and upholstery.
(32) Glassware.
(33) Heating, lighting, and ventilating apparatus.
(34) Belting, hose, machinery packing, and non-metallic tires.
(35) Musical instruments and supplies.
(36) Paper and stationery.
(37) Printing and publications.
(38) Clothing.
(39) Fancy goods, furnishings, and notions.
(40) Canes, parasols, and umbrellas.
(41) Knitted, netted, and textile fabrics.
(42) Thread and yarn.
(43) Dental, medical, and surgical appliances.
(44) Beverages, nonalcoholic.
(45) Foods and ingredients of foods.
(46) Wines.
(47) Malt beverages and liquors.
(48) Distilled alcoholic liquors.
(49) Merchandise not otherwise classified."

Smith-Hurd Illinois Revised Statutes, 1935, Chap. 140, Sec. 3.

However, while this classification may be reasonable and necessary to effectuate the purpose of the Trade Mark Act,

which is to prevent confusion in trade, that same classification when appropriated bodily for the purposes of the Fair Trade Act, that is, to foster free competition, becomes signally inadequate. Selecting as an example, general class "(14) Metals and Metal Castings and Forgings", it is at once apparent that the mere fact that one specific metal is in competition with another specific metal will not necessarily prevent a monopoly. A producer of copper may compete with a producer of iron, aluminum, tin or other metal and yet not compete with another producer of copper. Hence, though within the purview of the Fair Trade Act, he will still have the power to fix an unfair price because of his monopoly.

This the Act does not contemplate. Most of the other forty-nine classifications could be similarly dissected to demonstrate that they provide ample latitude for the creation of a monopoly which is still the object of condemnation by the public policy of the state. And to climax the futility of the classification, number "(49) Merchandise not otherwise classified", steps forward to sanction single-handed more potential monopoly than the other forty-eight classes combined.

III.

Section 2 of the Fair Trade Act delegates to persons not constituting the General Assembly, legislative powers and thus violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

1. Section 2 of the Fair Trade Act, in violation of the Constitution, delegates to any individuals who choose to avail themselves of that delegation, the power to regulate the prices of commodities sold by others.

On the subject of legislative power to control prices, *Nebbia* v. *New York,* 291 U. S. 502; 78 L. Ed. 940, may well be considered the most important case decided by this Court since *Munn* v. *Illinois,* 94 U. S. 113. The principle enunciated in the *Munn* case that when property becomes clothed with a public interest its use may be controlled for the public good, is in the *Nebbia* case extended to permit the control of the price of a certain commodity not affected by a public interest in the strict sense of the phrase.

But the *Nebbia* case in not the slightest degree qualifies the rule that such price regulation must be in conformity with the doctrines heretofore announced as controlling legislatures in their regulation of industries hitherto clearly recognized as being affected with a public interest. It is to those decisions which define the limits of legislative delegation of the power to fix rates and charges of public utilities that we must look for guidance in determining whether (assuming for the moment that the legislature has the power to pass an act of this general character) the method adopted by the Fair Trade Act is valid.

The following rules concerning the rate- and price-fixing power of the legislature are by this time so firmly estab-

lished that they may be regarded as axiomatic: The power to regulate rates and prices, where such power is recognized, is legislative in character. This power cannot be delegated by the legislature to any commission, board or individual. The legislature may, however, delegate to a commission, board or individual administrative functions in the fixing of rates and prices. But in delegating these administrative functions, the legislative body must lay down primary rules of guidance for the administrative body so that discretion is reduced to a point where it cannot be considered that the administrative body has any legislative discretion.

Hampton & Co. v. *United States,* 276 U. S. 394, 407-9;

Interstate Commerce Commission v. *Goodrich Transit Co.,* 224 U. S. 194, 214;

Schechter v. *United States,* 295 U. S. 537, 79 L. Ed. 1570;

C. B. & Q. R. R. v. *Jones,* 149 Ill. 361, 377, 37 N. E. 247.

The Legislature must fix a primary standard for the guidance of the administrative instrument—*Buttfield* v. *Stranahan,* 192 U. S. 470, 496; the Legislature must lay down general rules of action under which the commission shall proceed—*Interstate Commerce Comm.* v. *Goodrich Transit Co.,* 224 U. S. 194, 214: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."—*Hampton & Co.* v. *United States,* 276 U. S. 394, 409; arbitrary power cannot be delegated by the Legislature—*People* v. *Sholem,* 294 Ill. 204, 208, 128 N. E. 377, and cases therein cited; a statute which subjects any person's rights to the discretion of an officer,

without any rules or provisions in the law to control the officer, violates the constitution—*People* v. *Sholem*, 294 Ill. 204, 209, 128 N. E. 377, and cases therein cited; laws conferring discretionary and arbitrary power upon persons not governed by any fixed rules or regulations, amount in effect to a delegation of legislative function.—*Noel* v. *People*, 187 Ill. 587, 591, 58 N. E. 616; an act which delegates administrative powers but which declares no policy, establishes no standard and lays down no rule, amounts to a delegation of legislative power—*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 430. Abundant additional authority could be cited to the same effect.

Before applying the tests afforded by the foregoing cases to the Fair Trade Act, it will be instructive to examine the case of *Schechter* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570, wherein the National Industrial Recovery Act was held unconstitutional because it delegated legislative functions to the President. The Court points out on page 533 the machinery set up for determining "unfair methods of competition" under the Federal Trade Commission Act:

> "A commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact, supported by adequate evidence and for judicial review to give assurance that the action of the commission is taken within its statutory authority."

The foregoing description of the procedure under the Federal Trade Commission Act is representative of the machinery provided by every *valid* enactment which delegates to a commission or official a charge-fixing power. The Fair Trade Act is unique in its failure to provide the customary safeguards. It should be noted that the act sustained by this Court in *Nebbia* v. *New York*, 291 U. S.

502, 78 L. Ed. 940, regulating the price of milk, established a milk control board, which was authorized to make investigation in order to determine the price which would best protect the milk industry, and yield a reasonable return to the producer and to the milk dealer, provided for hearing of interested parties and for review of orders by certiorari. Thus the New York Legislature adopted the usual and customary procedure for the protection of the affected parties.

But the Fair Trade Act, in flagrant disregard of all precedent, utterly and completely fails to set up any kind of machinery for the protection of those persons subject to the act. In so far as the Fair Trade Act permits persons to bind themselves to maintain certain price levels, we do not conceive that to be price regulation. It amounts merely to the removal of certain restrictions heretofore possibly imposed by the Anti-Trust Act upon the right to contract. But in so far as the act purports to affect persons not parties to the contracts, it is clearly and definitely regulation of prices. (*Doubleday, Doran & Co., Inc.* v. *Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409. See also the dissenting opinion in *Max Factor & Co.* v. *Kunsman*, 55 Pac. (2nd) 177 (Calif.).

The Supreme Court of Illinois, in its opinion rendered in this case, 363 Ill. 559, on page 581, concedes that the Fair Trade Act is a price-fixing statute but upholds it on the distinction that it is "incidentally, a price-fixing statute." This characterization of the act is not readily understandable in view of the effect of the act. The *purpose* of the act may be other than that of fixing price, namely, the protection of trade-marks, but the primary and sole method whereby this purpose is accomplished is by the fixing of resale prices. By the same reasoning of the court, a law regulating rates of public utilities is only incidentally a price-fixing statute because it has as its purpose

the protection of the public against exorbitant charges. The fallacy of this reasoning is apparent. No amount of characterization can talk away the fact that the statute deals only with prices, that it provides for fixing of prices against the will of the retailer, that it gives the right to fix prices to certain private persons, and the sole point of contention in this case is that the defendant has been enjoined from selling at any price except the one fixed. Does this bear out the assertion that the Fair Trade Act is "incidentally" a price-fixing statute?

The Act in effect appoints indiscriminately a multitude of fair trade commissions (?) consisting of vendors and vendees not less than two in number. These respective commissions (?) are vested with the power of fixing a minimum resale price of the particular commodity in which they trade, which price becomes the standard below which no person can sell his commodities. The Legislature has laid down no rules, regulations, conditions or principles by which these commissions (?) must be guided. The Legislature has not even stipulated the fundamental requirement *that such price be reasonable.* It has been held in *C. B. & Q. R. R. Co.* v. *Jones,* 149 Ill. 361, 377, 380; 37 N. E. 247, that vesting in an administrative board the power to set rates and to determine conclusively whether or not such rates are reasonable is an unconstitutional delegation of power. How infinitely more susceptible to attack is an act that vests in a commission (?) an arbitrary power to determine a charge, unhampered even by the mandate that such charge be reasonable. If the delegation of the lesser power be condemned, upon what theory can this broader delegation be sustained? Under the *Jones* case not even the Legislature would have the right to fix a price which was not reasonable. True, the declaration by the Legislature that the price which it fixed was reasonable would

be conclusive upon that point (subject to constitutional restrictions) yet its legislation would have to be founded on the theory that it was establishing reasonable prices.

Furthermore, the Fair Trade Act provides for no notice to interested parties; no opportunity to be heard is afforded; no right of appeal from the action of fixing prices is given—there is unequivocably and emphatically vested in vendors and vendees the unbridled, arbitrary power to determine conclusively the prices of specified commodities with total immunity from interference of governmental authority, legislative, judicial or executive. A deliberate attempt to draft an act which would defy every requirement of fundamental principles of price-fixing and delegation of such power could have produced no more thorough result than the Fair Trade Act.

By way of constructive criticism, we point to the Fair Trade Act of Wisconsin (Wisconsin Statutes, 1935, Sec. 133.25) which contains all of the provisions of the Illinois Act and among other additional sections provides as follows:

> "(7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) (this section corresponds to Section I of the Illinois Act) is unfair and unreasonable as to the minimum resale price therein stipulated, the department of agriculture and markets may in its diseretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the department of agriculture and markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions,

said department may by special order declare such contract to be in restraint of trade.

* * *

(c) Decisions in such cases shall be subject to judicial review as provided in Section 93.20."

We are far from admitting that the Wisconsin Act conforms to constitutional requirements. In most respects it is as defective as the Illinois Act. We do say, however, that the provisions of the foregoing sections of that act are several steps closer to the goal toward which the Fair Trade Act must work if it aspires to constitutionality.

2. The Fair Trade Act in delegating legislative power to private persons violates the due process clause of the Fourteenth Amendment.

In support of our contention that due process forbids the delegation of legislative power, we deem it sufficient to quote the language of this Court in *Carter* v. *Carter Coal Company and Others,* 298 U. S. 238, wherein the Court in condemning a delegation of legislative power to determine maximum hours of labor and minimum wages to a part of the producers and miners of coal, said (p. 311):

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * *

"* * * one person may not be entrusted with the power to regulate the business of another, and espe-

cially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

The Fair Trade Act falls squarely within the condemnation of the Court by providing for "legislative delegation in its most obnoxious form * * * to private persons whose interests may be and often are adverse to the interests of others in the same business."

IV.

The Fair Trade Act is couched in language so incomplete, vague, indefinite and uncertain that it fails to express clearly and intelligibly the subject matter attempted to be covered and the acts permitted, required or forbidden to be done thereunder, and thereby violates the due process clause of the Federal Constitution.

1. The title must be regarded as a part of the Act and considered in its interpretation.

Article IV, Section 13 of the Illinois Constitution provides:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

The part that the title must play in the construction of the statute is defined in *People* v. *Fensky,* 297 Ill. 440, 130 N. E. 689. On page 443 of the official opinion the Court says:

> "The title must be regarded as a part of the act and considered in its interpretation, but the legislative intention must be found expressed in or implied from the words used in the body of the act *in connection with the title.*" (Italics ours.)

See also the following cases which require that the title of the act be considered in arriving at the intent of the legislature: *South Park Comrs.* v. *First Nat. Bank,* 177 Ill. 234, 238; 52 N. E. 365; *People* v. *Joyce,* 246 Ill. 124, 129, 92 N. E. 607.

Accordingly, in determining whether or not the Fair Trade Act conforms to the standards of definiteness prescribed by the authorities cited immediately hereafter, due recourse to the title of the Act is essential.

2. Statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application, violate the constitutional requirement of due process.

This Court has had frequent occasion to pass upon the constitutionality of a statute challenged on the ground that it was so vague in language that it violated the due process clause of the Federal Constitution. It has consistently held that in order to constitute due process a statute must be so phrased that persons reading the same may with certainty determine just what acts are permitted, required or forbidden to be done thereunder. The terms used therein must have a certain and definite meaning. Standards of conduct must be fixed with precision. No person affected by the act must be compelled to guess at the meaning of the statute. These principles are applicable alike to statutes creating crimes or prescribing civil rights.

International Harvester Co. v. *Kentucky,* 234 U. S. 216;
United States v. *Cohen Grocery Co.,* 255 U. S. 81;
Small Co. v. *Am. Sugar Ref. Co.,* 267 U. S. 233;
Connally v. *General Const. Co.,* 269 U. S. 385;
Cline v. *Frink Dairy Co.,* 274 U. S. 445;
Smith v. *Cahoon,* 283 U. S. 553;
Champlin Refining Co. v. *Corporation Com.,* 286 U. S. 210.

The authorities touching upon the question of certainty of statutes are so exhaustively reviewed and the problem is so ably treated in the cases above cited that greater elaboration of authorities would be superfluous. It is manifest that each statute presents its own problem. As for the Fair Trade Act, an analysis thereof demonstrates that, tested by the foregoing rules, it lacks the certainty essential to its validity.

3. The phrase "articles of standard quality" in the title of the Fair Trade Act is vague, indefinite and uncertain.

In the title of the Fair Trade Act the legislature expresses an intention to control the distribution of "articles of *standard quality* under a trade mark, brand or name." While in the body of the act the qualifying words "standard quality," are omitted, yet it is imperative, to accomplish the purposes of the Act, that effect be given to the limiting phrase contained in the title. It would be productive of great hardship if there were permitted to be fixed the prices of commodities which fluctuated in quality. It is only reasonable to suppose that the prices would fluctuate in sympathy with the quality and that different contracts fixing the prices would successively be consummated. This would produce the harsh situation, should prices go up as a result of improvement in quality, of compelling retailers to ask the higher price for a product of inferior quality manufactured prior to the price change. That the legislature fully appreciated the necessity of permitting only articles of standard quality to be fixed in price is evidenced by the title. It would be an unwarranted disregard of an important element of the statute if it should be ignored and given no force and effect.

Unfortunately for the statute, however, the matter of standard quality was ended where it was begun. There is no word as to what is meant by "standard" quality. No measuring stick is created with which to gauge any commodity. With no fixed and definite standards established, who is to determine whether or not a commodity is of such quality as will permit its price to be fixed? Shall it be the distributor, producer, owner, vendor, vendee, or all of them? Or shall it be the Court or jury which tries a case arising under the Act?

Another difficulty is the failure to specify the time at which the standard is to be determined. Is it to be the quality that existed at the time the Act went into effect? Is it the quality that exists at the time a contract is entered into? Or is it the quality that exists at the time the commodity is sold by the producer? The Act throws no light upon these questions. Furthermore, with the constant evolution which occurs in the normal course of events, the probabilities are the quality of the commodity improves or deteriorates. If the quality improves and a new contract is consummated calling for a higher price, is the retailer, who is not a party to the contract, bound to conform thereto, even though he may have the commodity of inferior quality to sell?

It is apparent that the entire question of standard is so uncertain that it is impossible for the defendant to determine whether or not the contract which he is called upon to respect covers a commodity of "standard" quality within the meaning of the Act. He can merely indulge in fruitless conjecture and resign himself to the drastic conclusion that to avoid the perils of litigation he must abide by whatever price any producer or owner may fix, regardless of the quality of the commodity.

4. The phrase "in fair and open competition" in Section 1 of the Fair Trade Act is incomplete, vague, indefinite and uncertain.

As a prerequisite to the fixing of the price of any commodity the act provides that it must be "in fair and open competition with commodities of the same general class produced by others." The Act does not define "fair and open competition" and we must, therefore, look to the common law or other expressions of the legislature to ascertain, if we can, the meaning of that phrase.

The proper approach to a solution of the question appears to be a negative one. What is "fair competition" did not concern the courts until recently. Rather their concern lay with the definition of what constituted "unfair competition" and the method of granting relief therefrom.

In *DeLong Co.* v. *Hump Hairpin Co.*, 297 Ill. 359, 130 N. E. 765, on page 371 of the official opinion, the Court adopts as the meaning of "unfair competition" the definition offered by the United States Supreme Court in *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 119, 140:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

And in *Johnson Manf. Co.* v. *Johnson Skate Co.*, 313 Ill. 106, 144 N. E. 787, the Court, again confronted with the question, holds (p. 112):

> "* * * no trade-mark is necessary to entitle the complainant to an injunction, if the defendants' use of the name and of its marks, packages and devices and methods is such as is likely to deceive purchasers of the defendants' skates into believing they are buying the complainant's skates. Such use of the name, and of such marks, packages, devices and methods, amounts to unfair competition, and in such case the question is whether the use is of such a character as to deceive purchasers, with the result that the goods of the defendant company are palmed off as the goods of the complainant."

As a matter of common law, then, we have to work from, not a clear definition of what comprises "fair competition"

but simply an exposition of what constitutes "unfair competition". While it might be argued that by "fair" the legislature intended such competition as was not unfair in its legal significance, that intention is not clear.

Leaving for the moment the common law as an aid to determining the meaning of the phrase, and seeking statutory clarification thereof, we find that in 1934 there was passed by the Illinois legislature an act, the short title of which is the "State Industrial Recovery Act." (Approved May 14, 1934, L. 1933-4, Third Special Session, p. 182. Smith-Hurd Illinois Revised Statutes, 1935, Chap. 38, Sec. 246 a, *et seq.*) The stated purpose of the act was to cooperate with the Federal government in effectuating the policies of the National Industrial Recovery Act (approved June 16, 1933).

In Section 3 of the State Act, "fair competition" is defined as follows:

> "The terms and conditions of any code of fair competition which has been or may be approved pursuant to the terms of the National Industrial Recovery Act, and of any announcement and regulations modifying the same or for the licensing of business enterprises which have been or may be issued pursuant to the terms of said Act for any trade or industry or subdivision thereof, shall be the standards of fair competition for such trade or industry * * *. The terms and conditions of any agreement which has been or may be entered into pursuant to Section 4 (a) of Title I of said Act shall be the standards of fair competition for the person or persons entering into such agreement * * *. The violation within this state of any standard of fair competition shall be deemed an unfair method of competition and illegal."

Here, then, we have, ostensibly at least, a definition of the term "fair competition" in its affirmative and not merely negative aspect. But judicial actions susequent to the enactment of the state Industrial Recovery Act have played havoc with it. The National Industrial Recovery Act was declared unconstitutional in *Schechter* v. *United States*, 295 U. S. 495; 79 L. Ed. 1570.

It will be enlightening to quote from the opinion in the *Schechter* case wherein the entire question of fair and unfair competition is considered at length.

(p. 531) "What is meant by 'fair competition' as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? * * *

The Act does not define 'fair competition'. 'Unfair competition' as known to common law is a limited concept, primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. (citing cases)

(p. 532) In recent years its scope has been extended. It has been held to apply to misappropriation, as well as misrepresentations, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. * * * Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. * * *

But it is evident that in its widest range 'unfair competition', as it been been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to con-

duct of that sort. The government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction. • • •

(p. 542) We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

This Court has accordingly held, unanimously, that the phrase "fair competition" was susceptible of no clear definition. What possible defense can there be against the charge that the Illinois Fair Trade Act in its use of the identical phrase is void for lack of certainty? If the highest court in the land cannot define "fair competition" as used in the Act, it is the clearest violation of due process to impose upon persons affected by the Act the task of ascertaining at their peril, the meaning of that phrase.

Furthermore, with the code-making provisions of the National Industrial Recovery Act declared unconstitutional what is the status of the State Act? With its dependence upon the existence of a valid Federal statute, it is unquestionably rendered innocuous. But it has not been repealed and stands in the statute books of the State with its declaration of what constitutes standards of fair competition. Just how far is it operative, if at all?

To say the least, the situation is confusing and complex. And the Fair Trade Act imposes upon persons the task of determining in the midst of this confusion and complexity whether or not "open and fair competition" is present.

To add to the confusion, the Fair Trade Act itself injects another perplexing element into the puzzle by defining "unfair competition" as "wilfully and knowingly adver-

tising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1." If by "fair competition" in Section 1 is meant the antithesis of the term used in Section 2, and such would be a reasonable expectation, then fair competition would mean advertising, offering for sale or selling at the stipulated price. But this consists in lifting oneself by the bootstraps. It would be necessary to enter into a contract, fix the price, and sell at that price in order to enter into a contract to fix the price. Regretfully, therefore, we must relinquish the Fair Trade Act as a possible aid in ascertaining the legislative intention when it used the phrase "fair competition."

But even assuming, contrary to the holding of this Court, that somewhere in the common law or in the statutes of the State there exists a definite and certain meaning of the term "open and fair competition", we submit that the problem is still not solved. The entire law on this particular point deals with the acts of *persons* in the pursuit of their business. Thus, unfair competition constitutes acts of a merchant which violate certain principles of ethical behavior and fair competition constitutes compliance of the merchant with those principles.

The legislature, however, in a novel departure from the orthodox concept of fundamental principles, invests the inanimate commodity with a conscience. The requirement of the statute is that the *commodity* must be in fair competition with other *commodities* of the same general class. Obviously, commodities cannot compete with one another fairly or unfairly. If the statute is given a literal interpretation, it must fall because it is meaningless. An endeavor to place an interpretation upon this portion of the Act that would be sensible leads inevitably to the conclu-

sion that the *dealers* in the commodity are required to be engaged in fair competition. But such construction is also fatal to the validity of the Act. *There is no person designated by the Act as the one upon whose shoulders rests the responsibility of engaging in fair competition and thus determining whether or not the price of the commodity may be fixed.*

The Act refers to "distributors", "producers", "owners", "vendors", and "vendees". It can be readily seen that with the entire hierarchy of persons ranging from producer to retailer, the numerous combinations possible are legion wherein one or more persons of the several categories are engaged simultaneously in fair competition and unfair competition, with reference to the same commodity. And in each of these possible situations, whose conduct will it be necessary to observe in determining whether or not the commodity is in fair and open competition? The Act is woefully silent on that score! And so is the decision of the Supreme Court of Illinois in this case, which nowhere offers any definition of the phrase "fair competition" although the charge was made and argued that it was so vague and uncertain that it violated the due process clause.

5. The term "any commodity" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

The charge of ambiguity can be leveled also at the expression of the duty placed upon the retailer, that is, he must not advertise, offer for sale or sell "any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act whether the person so advertising, offering for sale or selling is or is not a party to such contract."

It is impossible to conceive of a broader restriction than is contained in the foregoing extract from the statute.

The commodity affected is not limited to the one covered by the contract. The clear expression of the statute is that "any commodity" must not be sold below the stipulated price. A literal reading of the statute would mean that if the price of whiskey were fixed at $1.89 per quart, a retailer (for example, a department store owner) who sold also candy or salt or, in fact, any commodity other than whiskey could not sell that commodity below $1.89 per quart. Obviously a ridiculous, but literal interpretation of the statute. No doubt the legislature meant to say (but in fact did not) that the retailer could not sell the particular commodity covered by the contract below the stipulated price. But even under that interpretation, the duties are not clear. Assume that the price fixed is per certain unit of measure, as in the case of whiskey, the quart and the pint. Does that mean that only sales in that particular quantity are to be sold at the stipulated price? What of sales in other quantities—as by the glass. Must the price be proportionate? And if so, proportionate to what—the quart or the pint? From the complaint we see that there are two standards, the price per pint being proportionately higher. In the other direction, what would be the price per gallon? Or is there to be no restriction on the sales per glass, per gallon or per measure other than the measure stipulated in the contract? Again the retailer is tossed upon a sea of speculation as to the nature and extent of his obligations.

6. The phrase "any contract entered into pursuant to the provisions of Section 1" in Section 2 of the Fair Trade Act is vague, indefinite and uncertain.

The Act imposes upon a retailer the burden of abiding by the price stipulated in "any contract entered into pursuant to the provisions of Section 1." There is no re-

straint placed upon anybody regarding the number of contracts that may be entered into. Any buyer and any seller, be he producer, wholesaler, distributor or retailer, may enter into a contract. There may be more than one contract affecting the price of the identical commodity, and the prices stipulated in the contracts may be as diverse as the number of different contracts. Which one must a person respect?

No provision is made for superiority in efficacy because of priority in time or character of contracting party. Suppose one contract is entered into between a distributor and a retailer. Assume another contract covering the identical commodity is agreed upon between a second distributor and another retailer fixing a higher resale price. Is the first retailer, upon being notified of the second contract, bound thereby despite the fact that he is already party to a contract giving him the right to resell at a certain price? The plight of a stranger to both contracts is still more pathetic. Is he to be governed by the first contract or by the second? Two contracts are sufficient to throw him into confusion. Multiply the number of contracts to the unlimited extent permitted under the Act and we find him wandering about in a maze of conflicting contracts and prices from which the statute offers him no avenue of escape.

The opinion of the Supreme Court of Illinois, reported in 363 Ill. 559, throws no light upon the problems herein raised. The Court contents itself with the bare assertion that the phrases attacked are not ambiguous.

* * *

Enough has been pointed out to demonstrate that the statute is carelessly drawn and is so replete with vagueness, indefiniteness and uncertainty that no person, including the

appellant, can possibly hope to arrive at a clear and intelligent understanding as to what duties have been imposed upon him by the statute. The law is not definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution.

V.

An analysis of the opinion of the Supreme Court of Illinois in this case and of opinions of courts in other jurisdictions passing upon the validity of almost identical Fair Trade Acts, demonstrates that the sounder view considers the statute unconstitutional.

In the case of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409, the court of last resort of the State of New York without dissent held unconstitutional the New York Fair Trade Act which is almost identical with the Illinois Fair Trade Act. On the other hand, in *Max Factor & Co.* v. *Kunsman*, 55 Pac. (2nd) 177 (Calif.), the California Fair Trade Act, which is also almost identical with the Illinois Fair Trade Act, was held constitutional by the California Supreme Court. In this case there were two dissenting opinions.

The New York decision rejects the statute on the ground that it involves an unlawful delegation of legislative authority. That this conclusion is sound and amply supported by authority is clear from the argument made by appellant in this brief under his Point III.

The California decision confines itself to a consideration of whether or not the police power of the State extends to a point where it permits regulation of the price of commodities "not affected with a public interest" and con-

cludes that it does. Beyond that conclusion the California court does not go. Assuming for the sake of argument that the *Nebbia* case is sufficient warrant for the exercise of power by the legislature in the enactment of the Fair Trade Act, the California decision falls into the error, once it has determined that the statute is a price-fixing statute, of not recognizing the fact that vesting the price-fixing power in the producer, distributor or owner is an unconstitutional delegation of power. The New York decision correctly takes cognizance of this feature of the act. As has heretofore been argued, this delegation of power results in a denial of due process and consequently contravenes the Fourteenth Amendment to the Federal Constitution.

The decision of the Supreme Court of Illinois considers the question of delegation of power but concludes that the act does not provide for an unlawful delegation. Basing such conclusion on the distinction that the statute is only incidentally a price-fixing statute, the unsoundness of this reasoning has heretofore been argued under our Point III.

The decision in the California case furthermore is distinguishable from the case at bar in that the California court was not presented with or at any rate did not consider the charge that the due process clause of the Constitution has been violated by the vesting of arbitrary powers in private persons (see appellant's brief hereinabove Point I). As for the decision of the Supreme Court of Illinois, while that court was presented with this argument, it did not give effective answer thereto but in its treatment of that phase of the argument confined itself to a determination generally of the power of the legislature to enact a law of this nature. The specific charges that arbitrary powers were vested in private persons were not treated.

Another reason why the decision of the California court should not be considered pursuasive is that it fails to consider the violation of the due process clause occasioned by the vagueness, uncertainty and unintelligibility of certain phrases (see Point IV of our brief hereinabove). We have already pointed out that the Supreme Court of Illinois in its consideration of this argument failed to offer any clarification of the phrases which were attacked as being unintelligible.

The force of the California decision is considerably weakened by the two vigorous dissenting opinions. Mr. Justice Thompson soundly refuses to uphold the constitutionality of the act on the grounds that first it transcends the power of the legislature, and secondly it delegates legislative authority. We commend the dissenting opinion of Mr. Justice Thompson to the earnest consideration of this Court.

The appellee in this case attempted to distinguish the New York decision from the case at bar on the facts and relied upon the principle that a statute may be unconstitutional as applied to particular situations while constitutional as to others. The Supreme Court of Illinois agreed with this contention and held that the instant case was distinguishable from the New York case.

However, viewing the factual situation in both cases *in its essence* we find that both cases involve a contract entered into between a distributor of a trade-marked commodity of alleged standard quality (?) which is in alleged fair and open competition (?) with other commodities, which contract fixes the resale price that appellant, a party not in privity although knowing of the contract but expressly refusing to enter into the same, is compelled to observe. *These are the only facts which it is necessary to consider because these are the only facts which the statute*

requires to exist to give rise to the cause of action alleged in the complaint. All other allegations of fact in the complaint are superfluous. The plaintiff cannot frame a complaint in such elaborate fashion that factually it presents a situation which if provided for by the statute would conform to constitutional requirements. That, we submit, does not comprise a constitutional application of a statute but consists in the invention of a cause of action which is essentially different from the one created by the Fair Trade Act. We insist that only such facts as are required by the statute to exist can be considered. Plaintiff cannot cure the defects in the Act by supplementing the necessary allegations with sufficient other facts to overcome any objectionable aspects of the statute.

But even considering all of the allegations contained in the complaint, both essential and superfluous, we contend that the appellant is being deprived of the protection of the Fourteenth Amendment. The fact still remains in this case that the legislative power to fix prices has been delegated to the appellee and the persons with whom it entered into a contract, contrary to the appellant's constitutional right to have the legislative power exercised by the legislature, thereby depriving him of due process; secondly, the fact still remains that the appellant is deprived of due process because an arbitrary power has been vested in the appellee, (1) to set a resale price without restrictions of any kind whatsoever; (2) to notify the appellant and other retailers of such price, or to refrain from so notifying at its discretion, or to notify some retailers and not notify others, thus determining arbitrarily to whom the law shall apply; and (3) to enter into other contracts providing for a lower resale price without notifying the appellant of such reduction. And finally the fact still remains that the appellant is subjected to an Act which is so unintelligibly

phrased that he cannot determine what he is required, permitted or forbidden to do thereunder.

CONCLUSION.

We respectfully submit that the Illinois Fair Trade Act should be held unconstitutional and the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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